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JAMES H. McKENNEY,
Clerk.

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Reply Brf. of Samuels for Petitioner

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1901.

Filed May 1, 1902.

No. 262.

EDWARD H. CLARKE,

Petitioner,

vs.

WILBUR LARREMORE, Trustee in Bankruptcy of RAYMOND W. KENNEY,

Bankrupt.

REPLY FOR PETITIONER.

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Counsel for Edward H. Clarke,
Petitioner.

APPEAL PRINTING CO., 14-16 Vesey Street, N. Y.

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EDWARD H. CLARKE,
Petitioner,

against

WILBUR LARREMORE, Trustee in Bankruptcy of Raymond W. Kenney,
Bankrupt.

REPLY FOR PETITIONER.

I.

The statement made in the brief of the trustee, pp. 4 and 5, that Clarke's judgment was decided to be a preference, is erroneous. That point was not before the District Court and was not considered by it, nor by the Circuit Court of Appeals, as a reference to their opinions will show.

The petition of the trustee that the money in controversy be paid over to him, was founded solely upon the allegation that the judgment and levy were void, because they were obtained within four months prior to the filing of the petition in bankruptcy against Kenney (Rec. 39), and its prayer was in the language of Section 67 "f," and

the trustee admits that the order of the Court was made under the provisions of that section (Trustee's Brief, p. 2).

The case having been prosecuted in the Courts below under that theory, no endeavor can properly be made here to sustain the decree of the District Court under the idea of a preference which is a new and different theory, and which if it had been advanced would have been met with evidence on the part of the execution creditor.

> Home Fire Insurance Co. v. Western Transportation Co., 51 N. Y., 93.
> Stapenhorst v. Wolff, 65 N. Y., 596.
> Snider v. Snider, 160 N. Y., 151, 155.

Regarding the question of preference as being in the case, however, a reference to the testimony will make it appear that there was nothing to show the facts, which under Section 60, Subdivisions a and b are requisite to constitute a preference, namely, that the debtor intended to prefer the creditor and that the judgment creditor had reason to believe that it was intended to give him a preference.

Kenney had testified before the referee at his examination by his creditors, that Mr. George Bell (Clarke's present attorney herein), served upon him the summons and complaint in Clarke's action in the State Court (Rec. 57); that the consideration of the notes sued on and which he gave to his wife, was cash on the date they were drawn during the year 1894, which money was all put into his business. It was in the neighborhood of $15,000, and he had paid her very little thereon. She transferred the notes to her father, Mr. Clarke, and the latter sued him. He did not defend. Mr. Abbett agreed to hold it off and he did not do it (Rec. 58).

It may be remarked here that Mr. Abbett was largely interested in Kenney's business as the contract between him and Kenney shows, (Rec. 45). It was claimed that he was a partner of Kenney, (Rec. 42), and he took considerable part in enabling the latter to raise funds for the benefit of the business, (Rec. 43).

Kenney further testified that after the action was brought he went down to the attorney's office and told him that there was no necessity for bringing that suit; that they were perfectly solvent and were not pressed, but only by one or two creditors for a very small amount. He didn't live with his father in law, and does not know when his wife transferred the notes to him. He didn't ask her (Rec. 58).

After the suit was brought he spoke to his wife and got her to write to her father and get him to hold off. There was no conversation between his father in law and himself in reference to the bringing of the suit. There was no conversation between his wife and himself until after the papers were served (Rec. 59).

Previous to the suit, Mr. Clarke did not make a demand for the money, but made a demand for the interest on it; he had no arrangements with Mr. Clarke in relation to the obtaining of this judgment, and a sale of these goods. He did not know anything about the bringing of this suit, and had no transaction or conversation relative to the bringing of the suit until he was served with the papers. His wife did not know anything about it (*Rec. 59.*)

He further testified at the creditors' examination, that on the day before Clarke's judgment was taken, Mr. Abbett requested him to take stock and give him a detailed account of the business at that time; his book-

keeper drew off a statement from the books. The examination of the books was made on Saturday or Sunday before the judgment, namely, March 6th, 1899. He never had an opportunity of showing that statement to Mr. Clarke or to Mrs. Kenny. The object of going over the statement and having it accurate was to satisfy Mr. Abbett and Mr. Clarke that the business was perfectly solvent and was running all right (Rec. 61).

We believe that Section 60, subdivisions a and b are practically the same in legal effect as Sections 35 and 39 of the Bankrupt Act of 1867, and that under the construction given to that act the above facts would not constitute a procuring or suffering of a judgment, nor an intent to give a preference, nor would they show that Clarke knew that Kenney intended to give him a preference if such an intent existed.

Wilson vs. City Bank, 17 Wall, 473.

II.

The contention of the respondent that the adjudication of Kenney as a bankrupt is conclusive as showing that Clarke came within the provisions of Section 60, subdivisions a and b as a preferred creditor, is unfounded. That adjudication was not made under that Section, but under Section 3, subdivision a, clause 3, defining an act of bankruptcy, which lacks several elements specified in the former Section; moreover, it does not bind Clark as he was not a party to it. See Carroll v. Carroll, 60 N. Y., 121, 124, which was an action for the admeasurement of dower, but which decided this principle.

The notes sued on by Clarke were decided by the State Court to be an honest and valid debt. (Rec. 28).

III.

There is no merit in the respondent's contention that under Section 67, subdivision "f" the judgment is "void" and that consequently restitution by the Sheriff must be ordered as in the case of a judgment reversed on appeal. The judgment is valid and unaffected by the bankruptcy proceedings.

In re Pease, 4 Am. Bky. Rep., 547.

For example, if a bankrupt were to be refused his discharge and should afterwards acquire property, there can be no doubt but that all judgments existing against him at the date of the filing of the petition in bankruptcy, though recovered within four months prior to that time, could be enforced by execution, as against such after acquired property. It is only the *lien* of the judgment that becomes void. The nullification of the lien alone is effected by the adjudication in bankruptcy, and we again assert that in order that that effect should be produced the lien must be in existence at the time of the adjudication and must not have become *functus officio* by a previous sale.

Peck v. Carroll, 6 Am. Bky. Rep., 93, 95, 96.

Respectfully submitted,

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Counsel for Edward Howard Clarke, Petitioner.

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WILBUR LARREMORE, Trustee in Bankruptcy of RAYMOND W. KENNEY,

Bankrupt.

ADDITIONAL BRIEF FOR PETITIONER.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

S. LIVINGSTON SAMUELS,
Counsel for Edward H. Clarke,
Petitioner.

APPEAL PRINTING CO., 14-16 VESEY STREET.

In the Supreme Court of the United States.

OCTOBER TERM 1902.

EDWARD H. CLARKE, Petitioner, against WILBUR LARREMORE, Trustee in Bankruptcy of Raymond W. Kenney, Bankrupt.	No. 51

Additional Brief for Petitioner.

I.

The question as to whether under the evidence the judgment and execution of Clarke constituted an illegal preference is no longer presented in this cause. During the argument of the case, the counsel for the trustee stated in open court that he did not rely upon that point and would abandon it.

That concession includes the question whether Clarke's execution sale, from the fact of its being the one which formed the basis of the adjudication of bankruptcy under Section 3, Subdivision "a," Clause (3) of

the Bankruptcy Law, was thereby decided to be a preference under Section 30 Subdivisions "a" and "b." Clarke was not a party to the adjudication of bankruptcy and was not bound by it, and was at liberty to controvert any fact which it decided as to the preferential character of his judgment, execution and sale (Reed v. McIntyre, 98 U. S., 507, 512). By reason, however, of the concession above mentioned, we are not obliged to go into that question, and the only one in the case therefore, is as to the proper construction of Section 67, Subdivision "f."

II.

The argument of the trustee on that point is based upon the general language in the first part of the Subdivision to the effect that "*all* levies" etc., obtained within the specified time are to be deemed null and void; but this language is to be qualified by the rest of the sentence in which it occurs. The context shows that Congress did not have in mind the abstract idea of levies and other like liens, generally but the concrete idea of a specific piece of property, while affected by such a lien, being brought before the Bankruptcy Court for the purposes of administration in a bankruptcy proceeding. This is shown by the use of the words "deemed," "court" and "purposes of the section." "Deem" when used in a statute means to "adjudge." (Blaufus v. People, 69 N. Y., 107, 111; State v. Price, 11 N. J. L., 203, 218). Instances of this meaning of the word afforded by Sec. 60, Subdivision "a," and the last sentence of Sec. 67, Subdivision "e."

"Court" in Subdivision "f" means, the Court of

Bankruptcy in which the proceedings are pending and may include the referee. Section 1, Definition 7.

"Purposes of the section" evidently refers to the intention expressed in Subdivision "f" of passing title to the property there mentioned to the trustee, freed from the lien, or, in the discretion of the "Court," the lien itself, so that it may be enforced by a sale for the benefit of the estate.

The words which we have defined show that the Legislature, had in mind the idea of specific property encumbered by a levy or other lien coming before the Bankruptcy Court to be administered upon. The Court is then to hear evidence as to whether the property belongs to the bankrupt, whether the lien was obtained within the specified time, whether the bankrupt was insolvent when it was obtained, and whether there has been an adjudication of bankruptcy. If these matters are made clear the Court of Bankruptcy is then to "deem," that is, adjudge, that the lien is null and void, and that the property shall pass to the trustee, free from the lien, as a part of the bankrupt's estate. The Court may, however, in its discretion, order that "the right under the levy," which means the privilege of enforcing it, shall be "preserved," instead of being rendered null and void and shall pass to the trustee, and thereupon the Court may order such conveyance as may be necessary to carry the purposes of the section into effect. Those purposes are to dispose of the "property affected by the levy" or other lien, for the best interests of the estate, in either of the methods prescribed by the section. If there is no "property affected by a lien" before the Court for administration there is nothing to call its judicial powers into action un-

der Subdivision "f". There is then, no property to pass to the trustee, and no lien to be adjudged null and void on the one hand or ordered to be preserved on the other.

If we omit the general language at the beginning of Subdivision "f" and transpose the words contained in it there can be no doubt as to its true meaning.

The Subdivision will then read substantially as follows:

"Whenever property of a person is affected by a levy or other lien obtained through legal proceedings against him while insolvent within four months prior to the filing of a petition in bankruptcy against him, such lien shall be deemed null and void in case he is adjudged a bankrupt and the property shall be deemed," etc. Dealing with this concrete idea of certain specific property, affected by a lien, which is what Congress had in view, it is easy to see that Sec. 67, Subdivision "f," does not refer to the case of money realized by a sale under execution prior to the bankruptcy proceedings, whether it be in the hands of the creditor or of the sheriff, because in that case there is neither property nor lien to be disposed of by the Bankruptcy Court.

We think that Subdivision "f" has substantially the same meaning as Subdivision "c" of the same section, with the exception of clauses (1), (2) and (3). That speaks of "a lien" being "dissolved" by the adjudication, and provides for the same discretionary action by the Court with regard to preserving the lien. It clearly refers to an existing lien and not to one already extinguished by a sale for it is a solecism to speak of the latter as being liable to be dissolved.

III.

The foregoing construction of Subdivision "f" is justified by principles well settled in the interpretation of statutes.

In Atkins v. The Disintegrating Co., 18 Wall, 272, 302, the Court says:

"The general language found in one place may be restricted in its effect to the particular expressions employed in another, if such, upon a careful examination of the subject, appears to have been the intent of the enactment:" citing Brewer v. Blougher, 14 Peters, 198, 199; Miller v. Salomons, 7 Exchequer, 546; same case, on error, 8 *id.*, 778; Wambaugh v. Middleton, *ib.*, 356, 357.

In the construction of statutes the general words in one clause may be restrained by the particular words in a subsequent clause of the same statute. City of Covington, v. McNickle, 18 B. Mon., 262, 286.,

In construing statutes, the inquiry is, not as to the abstract force of the words used, but in what sense the Legislature intended to use them; and this sense is to be collected from the context; and a *narrower* or more extended meaning will be given according to the intention thus indicated.

McIntyre v. Ingraham, 35 Miss., 25.

In conformity to the foregoing principles of construction the words "all levies" etc. may be restricted to the levies and other liens mentioned later on in Subdivision "f" viz.: those existing at the date of the adjudication. The word "all" is frequently contracted in meaning in this manner in construing statutes.

The word "all" is frequently to be restrained

in an Act, not only by the context, but by the general form and scheme of the statute, as demonstrative of the intention of the Legislature.

Phillips v. The State, 15 Ga., 518, 520.

In Acts of Assembly as well as in common parlance the word "all" is a general, rather than a universal term, and is to be understood in one sense or the other, according to the demands of sound reason.

Stone v. Elliott, 11 Ohio St., 252, 258.
Kieffer v. Ehler, 18 Pa. St., 388, 391.

The propriety of thus narrowing the meaning of the words "all levies," is shown by the fact that to give them the universal signification claimed by the Trustee would result in the injustice of depriving an innocent creditor of the benefit of a payment of his debt obtained through legal remedies long before the inception of proceedings in bankruptcy. Such payments have been always protected in the bankruptcy systems of this country or England.

"Where a particular construction of a statute "will occasion great inconvenience or produce in-"equality or *injustice* that view is to be avoided "if another and more reasonable interpretation is "present in the statute." Knowlton v. Moore, 178 U. S., 41, 47.

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